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The Los Angeles Bar Association BULLETIN

Official Publication of the Los Angeles Bar Association, Los Angeles, California

NO "DELAYED JUSTICE" HERE

FOR CONSTITUTIONAL AMENDMENT NO. 98

AGAINST CONSTITUTIONAL AMENDMENT NO. 98

BOARD OF TRUSTEES

OIL AND GAS ROYALTIES

BALLOT FOR BAR OFFICERS

ANNUAL MEETING

Installation of 1934 Officers and Trustees
University Club · Thursday, February 15
Dinner 6 p. m. · $1.10 · Informal

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No "Delayed Justice" in Los Angeles Trial Courts

LITIGANTS ABLE TO OBTAIN PROMPT TRIAL. SAVING OF TIME AND MONEY ACCOMPLISHED UNDER PRESENT MASTER CALENDAR SYSTEM.

By Ewell D. Moore, of the Los Angeles Bar.

THROUGHOUT the country, newspapers and other publications are directing public attention to the courts and their administration, and demanding that the Bar concern itself with the problem of "speeding up" justice. They point out that in some of our large cities it takes two or three years to bring a civil case to trial, and very properly inquire the reason for the unconscionable delay.

Such delay is, of course, inexcusable and is rightly condemned by the public. But the public should also be informed of the continuous and determined purpose of Bar Associations everywhere to improve this and other problems affecting the administration of justice and the conduct of those engaged in the practice of the law.

PROMPT TRIALS IN LOS ANGELES COUNTY.

A few years ago it took 18 months or more to bring a civil case to trial in the Superior Court in Los Angeles County. Today a civil case may be brought to trial, and tried, in this county in sixty days from the date of filing the complaint. That which has been done here, can, of course, be accomplished in other jurisdictions with the co-operation of the judges and lawyers.

Let us analyze the report of Judge Marshall F. McComb who, since December, 1931, has had the management of the civil calendar, recently submitted to Presiding Judge Hartley Shaw of the Superior Court.

On December 8, 1931, there were 1784 civil cases set for trial, and 4805 cases awaiting trial, unset. On December 31, 1933, there were 914 cases set for trial, and *no cases awaiting to be set.* From December 8, 1931, to December 31, 1933, 9938 cases were handled in the civil calendar department.

Of the 914 cases set for trial at the end of 1933, the last case will be tried, in the opinion of Judge McComb, by the end of January, 1934.

No "delayed justice" in that situation.

The public should know this, but the courts and the Bar are without the means of publicizing the facts except through the local bar publication—even though they should seek publicity, which, as a rule, they do not.

JUDGE MC COMB'S REPORT.

For the benefit of the local Bar, as well as other Bar Associations who are struggling with congested calendars and "delayed justice," I quote from Judge McComb's report, as of the close of 1933:

"On December 8, 1931, of the 1,784 cases then set for trial, the last case would have been tried the following March (1932), while the best estimate as to the time the last of the 4,805 *unset* cases would have been reached for trial, was about June, 1933, or eighteen months later.

"On December 8, 1932, after our new system had been in operation for one year, there were 1,244 cases set for trial, and the last case, according to our records, was tried in January, 1933, or about two months later. We had also, in the meantime, completely disposed of the reserve list of unset cases (4,805) awaiting trial, which had contributed so largely to the intolerable condition of the calendar.

"We have been able to improve upon that record to an even greater extent during the past year. Of the 914 cases set for trial as of December 31, 1933, the last case will be tried in January, 1934, or a little over a month later. An explanatory graph showing the period elapsing from the time motions to set are filed, until the trial date, for the years 1931, 1932 and 1933, is attached, marked 'Statement 1.' (The 1931 figures, however, are based on information taken from the most accurate records obtainable, which we have found to be incomplete and very unsatisfactory.)

EXCELLENT CONDITION OF CALENDAR.

"Our civil trial calendar has never been in as excellent condition as it is today; in fact, I do not hesitate to say that it is doubtful whether any court of our size in the United States can submit as good a

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THE ASSOCIATION NEEDS YOUR HELP-- ARE YOU WILLING TO RESPOND?

A FEW WEEKS AGO the Board of Trustees discussed the advisability of holding a Membership Campaign at this time. Earle M. Daniels, a member of the Board, responded to the Board's urging him to take charge of the campaign, and when the cost of the campaign was discussed, Mr. Daniels advised the Board that he would endeavor to conduct the campaign at no cost to the Association. This he has set about to do, and right now is asking, and is entitled to, your assistance and cooperation in a definite and tangible way.

You and each of you are urgently requested to secure a member. It has been two years since a membership campaign has been conducted, and there are, no doubt, a number of attorneys in your building who are not members of the Association.

Practically every member of the Association displays his Membership Certificate by placing it in a frame upon the wall, or under the glass top of his desk.

If you desire to solicit someone and are in doubt as to whether he or she is a member of the Association, phone the office, Vandike 5701, and inquire. If you do not have any particular person in mind in your building or vicinity, and are willing to assist us in this matter, phone the office for names of prospects.

There never was a time in the history of the Bar when it was so necessary for the attorneys to present a united front for concerted action. It should not be necessary to have to "sell" a member of the bar the idea that he should contribute his part to the promotion and protection of the practice of law.

The Dues of the Los Angeles Bar Association are $10.00 (per year, which includes subscription to L. A. Bar Association Bulletin), and have not been increased since 1916, notwithstanding the increase in cost of operation, and material increase in activities. If a member of the bar has been a member of the Association and has allowed his dues to become delinquent, it is also necessary for him to pay his delinquent dues, which are usually $5.00.

Phone the office of the Association right now and ask them to advise you of the names of non-members in your vicinity, and to mail you the necessary application blanks.

record. That this situation has been maintained during the past year under circumstances that have rendered accomplishment more difficult, is a fact already well known to you.

"During the last year we have had only the minimum of out-of-county and Municipal Court Judges; an average of approximately two out-of-county, one Municipal Court and three pro tem Judges have been used per day each month since January, 1933. Incidentally, our records indicate that about 636 cases were tried by 210 pro tem Judges during 1933. The use of their services has brought about the trial and disposition of cases which would have taken the court at least two months longer to reach, and in fact comprises nearly one-sixth of the total year's work.

"I can not praise too highly the generous response which the Bar of this county has given to our repeated requests for assistance by way of acting as Judges pro tempore. The uniform willingness and courtesy with which my requests have been met by all those is indeed gratifying. In addition, it is to be noted that the services of these gentlemen have been of a consistently high-grade and satisfactory character.

HARD WORK OF JUDGES.

"We have succeeded, through the system established in the Calendar Department, in obviating to a considerable extent the delay formerly attendant upon the transfer of cases, resulting in a very substantial saving of the trial judge's time. This has been effective in increasing the number of cases tried by the Judges each month. For example, in 1931 an average of approximately nine and one-half cases were tried per month by each of the civil Judges; in 1932 this was increased to fourteen cases, and in 1933 an average of thirteen cases were tried per month per Judge. This is an increase of 37% in the amount of work each Judge now accomplishes.

"It may also be interesting to you to know that there were 26,424 civil cases filed in the County Clerk's office last year, which is some 339 cases less than that filed the preceding year; however, during the last five months of 1933 the number of cases filed each month has shown a substantial increase over the number filed during the same period in 1932. There were 4,543 civil cases tried last year; in 1932 the number of cases tried was 6,238; at that time, however, we had many more out-of-county and Municipal Court Judges working in our courts. The number of setting cards filed in 1933 was approximately 7,235, whereas in 1932 only 6,137 motions to set were filed.

DEFAULT DEPARTMENT.

"During 1932, our records show that 5,596 defaults and petitions were handled; in 1933 a total of 6,175 of these were acted upon, thereby indicating an increase of 579 defaults and petitions heard during the year 1933.

CIVIL JURY DEPARTMENT.

"The results obtained through our improved method of handling civil jurors, as submitted to you heretofore in letter dated December 5, 1933, show a saving of $19,965.50 during 1933, over the previous year under the old system, and at the same time 51 more cases were tried under the lessened cost. From an average cost to the county of $61.05 per case under the old method, the cost was cut under the new system to $32.90 per case, effecting a saving to the taxpayers of the County, of almost half the former cost."

CRIMINAL LAW AND ITS ENFORCEMENT

"The present fight being waged upon crime is not going to progress satisfactorily unless and until an improvement is made in our methods of bringing criminals to trial—under our present system the odds are too much in favor of escape.

"During the past decade most of our counties have been spending enormous sums for highway purposes—making it even easier for escape—while cutting every other function of government in order to have more road funds.

"With Oklahoma taking the highest insurance rate possible on many crime risks, it is time that something is done.

"To that end we suggest the placing of the law enforcement agencies into one general organization, removing them from politics and giving these officers modern equipment, for, as the chance of escape becomes smaller, crime will decrease." —*Oklahoma State Bar Journal,* December, 1933.

ATTENTION TO EMPLOYERS!

HELP YOUR FELLOW MEMBERS! The office of the Association has on file applications for employment classified as follows:

Experienced practioners seeking salaried positions;

Attorneys recently admitted seeking salaried positions;

Experienced and unexperienced attorneys who are willing to render services for desk space;

Attorneys seeking working arrangements that will permit of their taking care of their own clients;

Legal Secretaries and Stenographers.

Telephone Vandike 5701 and Vandike 9992.

Your communications are kept confidential.

Assembly Constitutional Amendment No. 98

ARGUMENT THAT IT SHOULD BE SUPPORTED

By John Perry Wood, of the Los Angeles Bar

THE ARGUMENT that I have heard expressed against this amendment is that it deprives the people of their right to select their judges by direct vote. The proponents of this objection overlook the facts (a) that under the present system the people have not real, but only a theoretical, control, (b) that the people do not and cannot exercise the control they now have, and (c) that the result is the steady deterioration of the bench.

Under the amendment, the people, through the exercise of the representative principle and by the application of civil service principles, will have a real control; the officials who select the list from whom the Governor appoints, will themselves be directly responsible to the people, and the amendment will take the judges out of politics, make the office attractive to the right sort of lawyers, and in the course of a few years should make the entire bench the equal of at least the upper fourth of the present bench.

Of the 50 judges now in office, 35 were appointed by a Governor in the first instance; seven more were appointed by a Governor to the Municipal Court, whence election to the Superior Court has been comparatively easy. The name "judge" and the publicity attendant upon the judgeship gives the incumbent, whether of the Municipal or Superior bench, a tremendous advantage at elections. The better lawyers will no longer accept appointment to the Superior bench, nor become candidates for it at an election. In consequence, the people have only a choice between the incumbent and someone no better, or about whom the people have no adequate knowledge. Therefore, the incumbent is almost invariably elected. He is elected, with certainty, if he is politically minded and takes advantage of the political opportunities that the judgeship gives.

ELECTIONS AND APPOINTMENTS.

As stated, 42 of the present bench were appointed in the first instance. Six more previously occupied public offices which brought their name to public attention, enabling election. Only two were elected by the people from the bar, in the first instance,—Judge Ruben Schmidt and Judge Walter Gates. The former was obliged to run four times before succeeding of election. The latter had no opposition by reason of the fact that his predecessor failed to file nominating papers to run to succeed himself at the election. Judge Gates was the only one to file. He, therefore, had no opposition.

The net result is that we really have an appointive system, now. The appointment is by the Governor, without any restriction. The people, in effect, are little more than rubber stamps for unrestrained gubernatorial appointment. Clearly, the people do not now have or exercise real control.

A VOTERS' STRIKE.

In addition, it must be remembered that of all who last voted in Los Angeles County for the office of Governor, 60% failed to cast a single vote for any candidate for the Superior bench. There is practically a voters' strike. The people have given up the unequal struggle. To careful observers it is clear that the people are looking to the Bar to propose a remedy. Assembly Constitutional Amendment No. 98 supplies that remedy.

At present, even the best judges must give a considerable portion of their time to keeping up political contacts. A questionnaire was answered by the 18 judges to whom it was presented. Their answers showed that the total time given to political contacts by this 18 was equivalent to the full working time of five judges. Certainly some way must be found to obviate this and give the people a proper return for their money.

There is no uniformity of judicial ability among the judges. The number of cases tried over a sufficient period, is certainly a fair indication of the judicial ability. A check of the work done in all

of the civil departments over a period of two years showed that the work of the judges varied as six to one. The best judge tried six times as many cases as the one who tried the fewest; he tried three times as many as the average. Qualitatively, the work doubtless varies as ten to one. Incidentally, the judge who tried the most cases is the one whose judgments are generally regarded by the Bar as the soundest. The quantitative yardstick, is, therefore, a fair measure of the judicial ability. Certainly, something must be done to improve the average ability, and bring it nearer to the ability of the best of judges. The amendment should do this.

POLITICS A FACTOR.

Casual thinking might induce the thought that the amendment will merely perpetuate the incumbents in office. To this, there are two answers:

(a) That is the case under the present system. The occasional defeat of a judge comes to the one who is judicially the best qualified, but who is not a good politician. It is such that the politically-minded candidate picks out to run against. The judge who gives time and thought to politics practically is never defeated.

(b) At present, an incumbent can be retired only by elevating in his stead someone no better qualified or about whom the people have not sufficient knowledge. In consequence, the incumbent is retained, particularly since the ballot shows that he is an incumbent judge. Under the new method, the people can vote to retire an unqualified incumbent, without paying the cost, under the existing system, of putting in his place someone no better. They will know that if they retire an incumbent, his place will be filled by appoint by the Governor from the selected list of one who will be well qualified.

At all events, time will supply the remedy. Experience shows that our bench changes its personnel almost, thought not completely, in eight to ten years. If a good man can be supplied to fill each vacancy as it occurs, the quality of the bench will eventually, but surely, be greatly enhanced.

In considering whether incumbents will be retired without waiting for death, resignation or appointment to another bench, it must be remembered that now the Bar, and that portion of the public that gives serious thought to the selection of the judiciary, is obliged to dissipate its energy among the many candidates to prevent the defeat of the good judges as well as the selection of unqualified candidates. Under the proposed method, the good judges will remain as a matter of course. No loud tooting candidate, politically wise or with a campaign chest, can run against him. No valid argument can be offered against his retention. He can go about his judicial work with a mind undisturbed by the thought of future elections. Therefore, the entire effort of those who know the quality of the judges can be given to informing the people about those who should be retired. Each judge will be obliged each six years to run against his own record. The temptation to laziness or arrogance that straight life tenure brings, will be practically non-existent.

FAVORITISM ELIMINATED.

It might be thought by some that the Chief Justice, the Presiding Justices of the District Court of Appeal, Division One, and the State Senator, who constitute the selecting board, will be immersed more deeply in politics. The contrary is true. Both a proper regard for duty and enlightened self interest will impel the board always to propose to the Governor only well qualified persons. Undoubtedly, the board, by rule that it may establish, will adopt a means of selection that will eliminate favoritism and political consideration. To do otherwise will bring upon the board the severest condemnation. Nothing will do more to place the officers of the board above politics than for the board to place upon its selected list only outstanding and thoroughly qualified lawyers.

Someone said that if the people cannot wisely select the fifty judges, how can they select the three who constitute the board. The answer is, (a) it is much easier to make a wise choice of three than of the many candidates who make up the fifty, and (b) the people can concentrate their efforts upon the selection as members of the board, of qualified persons only. At all events, the board will have time and means at its disposal to examine into the qualifications of candidates. At present the voter in our population of two and a third million, and with as many as 105 candidates for the Superior Court upon

one ballot, in the nature of things, cannot know or learn which candidates possess the character, legal learning and technical skill required of a judge.

AMENDMENT ENDORSED.

The amendment has already been approved by twenty-six bar associations before whom it was argued out at length. No group of lawyers has resolved against it. In one only was there any real opposition. In each instance, the arguments against the amendment showed that the opponents had not thought the matter through. The opposition, in some instances, was doubtless sincere. In others, unfortunately it came from those who are perennial candidates for the bench, to whom the placing of their names upon the ballot is a cheap form of advertising, and who hope that they may get upon the bench under the present method, and who know that under the proposed method they would have no chance. One of these said that to be on the board would be worth $50,000.00 per year. That person, when asked "If that be true, how much should it be worth to a Governor who makes the appointment without restriction?" was unable to answer. There is no answer.

There is no thought that pecuniary motives enter into present appointments. However, a Governor, properly disposed, would be glad to have the assistance of a properly constituted board, responsible to the people, to make up the list from which his appointments shall be made. For 20 years the American Judicature Society has sponsored the selected list principle. In addition to the Bar Associations referred to, the amendment has been endorsed by the Chamber of Commerce of Los Angeles, The Los Angeles Junior Chamber of Commerce, the Chamber of Commerce of San Francisco, and at least one hundred other groups of laymen. The American Bar Association for years has urged appointment of judges.

In considering whether the board will do politics in making up its list, it must be remembered that the board does not make the ultimate appointment. Temptation on its part to do politics, is, therefore minimized. The Governor will be obliged to appoint from the selected list of not more than three times nor less than twice the number to be appointed. Any political consideration that might actuate him cannot result in any poor appointment, since he is confined to the list of qualified persons selected by the board.

The people recognize the need of a change. They, and their spokesmen, the press, are demanding it. They look to the Bar for the remedy. The California State Bar proposed the amendment to the Legislature. It passed the Assembly by an overwhelming vote, and the Senate without a single dissenting vote. The amendment is ready to the people's hands, for the first time since 1879. Will the Bar not be responsive to its duty and the popular demand. If the amendment fails, the reproach will fall upon it.

Assembly Constitutional Amendment No. 98

ARGUMENT THAT IT SHOULD NOT BE SUPPORTED

By Robert A. Morton, of the Los Angeles Bar.

A CONSTITUTIONAL AMENDMENT is to be offered to the voters at the next general election that is designed to work important and experimental changes in judicial selection in this county. It would seem that the lawyers of Los Angeles County might well examine and consider the proposed Act with care and candor as a matter of great public concern. The plan itself must now be familiar to lawyers. In essence it provides for appointments to vacancies by the Governor from a list of not less than two nor more than three candidates for each office, the lists to be compiled by a Board made up of the Chief Justice of the Supreme Court, the presiding Justice of a local District Court of Appeal, and the Los Angeles State Senator. After four years the appointees would go on the ballot without opposing candidates, to be voted upon for retention in office or dismissal.

PROPOSED PLAN.

The latter provision would work little change in the results of the present method, as appointees almost invariably retain office at the polls, with an occasional exception when the contestant is a popular judge of the Municipal Court. As Miss Bates has indicated, of the Superior Court Judges now in office about ninety-six percent were appointees. The proposed plan, by eliminating competition at the polls, would merely extinguish the present slight possibility of the defeat of an incumbent, unless a campaign of the recall type should be waged by organized effort. To all intents and purposes the Amendment provides for a life term for judges, subject to good behavior, whatever that phrase may suggest. Those who believe that judges should be appointed for life, albeit subject to common infirmities both patent and latent, will not be heard to complain on that score.

The more obscure and to my mind the more vulnerable part of the Act is that relating to the unique composition of the Board and to the selection and choice of nominees. By what procedure the majority of two Justices and the minority State Senator (who may be lawyer or layman) would be able to choose as between many candidates and as among themselves presents an enigma. Presumably the gentlemen would not resort to chance or to any exchange of favors; but on the other hand it can be believed that if the intention was that the two Justices would have their way the State Senator would have been omitted as superfluous. One could hardly hazard a guess as to what rules or personal arrangements would be most likely to promote harmony on the Board and at the same time provide the Governor with lists solely of the best qualified candidates.

OBSTACLES TO BE MET.

When the point is reached where the Governor is to exercise his prerogative to choose from a given list, another possible obstacle to the attainment of a perfect judiciary is met; for theoretically he must be able to peruse each list of two or three nominees without recognizing any names sponsored by the State Senator. In view of the importance of the Senator from populous Los Angeles in the governmental fabric in Sacramento, it could easily be possible that the fortunate candidates would be those who had successfully courted the Senator directly or indirectly. The result could be otherwise if and when the Chief Executive and his Los Angeles Senator were unable to reach an accord. Inasmuch as the principal object of judicial reform is said to be the minimizing of unnecessary political factors as far as may be possible, the injection of the Senator into the plan is not clearly understandable unless his office has been conceived, however erroneously, as a *liason* between the courts and the political managers. Some of us feel that we should not go out of our way to unduly expose judicial officers to the atmosphere of strife for office.

PREVIOUS PLAN DISCUSSED.

It will be recalled that last year our Bar Association by its Committee presented a very different plan for selecting judges. It was read in open meeting by Judge John Perry Wood, and it provided for the election of non-partisan commissioners who would select judges solely upon a judicial qualification basis. The Committee spokesman assured the Bar that the members believed their plan to be the best that could be devised in view of the general situation, and that it would provide the County with an improved judiciary. Armed with the plan the Committee went to Sacramento to interview the legislators. It is said that the labors of the Committee received the close scrutiny of the law makers, also that of the Commonwealth Club (an organization reputed to be of uncommon sagacity in political affairs), and that also of numerous lawyers not residents of Los Angeles County. In any event the highly praised Committee plan fell by the wayside, and some months after the Committee had returned home considerably discouraged the present Act was substituted for it, with a saving clause to prevent adoption by any County other than Los Angeles. The trustful spirit evidenced by the law-makers in thus confiding the Act exclusively to Los Angeles was noteworthy, unless it be that the Legislature was rather moved by a desire to extend its protection to the remainder of the State. As the matter now stands the entire State electorate will vote the plan into Los Angeles County if the Amendment should be adopted.

After the Legislature had acted the plan carried in a statewide plebiscite of the State Bar, wherein only one lawyer in three participated, and a Committee was appointed and a sum of money was appropriated by the State Bar to popularize the Act prior to the next election. It was all carried out expeditiously and without any effort to circulate a close analysis of the plan or to invite widespread consideration among lawyers as to its probable consequences. But nothing here said should mitigate against the Amendment if its theory is sound.

WOULD LOCAL BENCH BENEFIT.

It is now clear how our local Bench would benefit by the Amendment, for we are told that the accomplishments of the present Superior Court Judges would be equalled by one-half to one-third of their number by virtue of a more gifted type of judge to be born of the Act; and as a consequence thereof the tax-payers would save about one-half million dollars now annually wasted by the present personnel. I do not believe that such conclusions are warranted by the facts as we know them to be. In my opinion the interests of justice are best served by judges who are permitted to take their own time in the trial and consideration of a lawsuit. A court is not a high-pressure institution for mass production, nor is it primarily designed to turn in a ledger profit. The best Judges that our County has ever had were, and are, careful, painstaking, thorough and considerate. The qualities that we define as *judicial fitness* cannot be speeded up like a mechanical process. In a given time a competent judge will be more productive than one of lesser ability, but such productivity can never be gauged by the mere saving of time, or by the number of cases handled per month or year. More often the true judicial index points in the opposite direction.

The claim that with the Amendment in operation, the less capable judges would be out in eight to ten years in the ordinary course of nature and by resignations, appears to offend the mortality tables, and is at best discomforting. Such space of time seems too long for most of us to wait, and then again the laws of nature might not discriminate in favor of the judges best qualified to remain on the Bench. The Act fails to mention just where the one-hundred percent judges would be found, at the prevailing salary schedule. Perhaps the Bar should be chary about giving wide circulation to claims for the Act which would surely prove to be over-enthusiastic.

GESTURE TO PUBLIC.

The provision of the Amendment that permits the voters, after four years, to reject or retain a judge, is of course, a mere gesture to the public. Where incumbents are now practically immune from defeat at the polls, even when opposed by active candidates; and where impeachment proceedings before any Legislature almost invariably fail to remove a judge, such removal by popular vote would be a most rare circumstance that could occur only when and if a judge should possess so little discretion as to commit a public offense involving moral turpitude before numerous witnesses. The defects of lack of judicial ability, or mental deterioration, or clever dishonesty probably could never be reached by such method.

Those who may desire to divide the appointive power between the Governor and the State Senator would be disappointed, for although the Act purports to check and double-check the Governor it would miss the mark. However, as a creator of political complications and confusion in which all of the courts would have to become involved, it would function with efficiency. The Act is rather in the nature of an unworkable hybrid, fashioned by political compromise.

APPOINTIVE METHOD FAVORED.

In my opinion the Governor should not be required to assume the inevitable responsibility of appointing judges with his hands tied. The consensus of well-informed belief favors the appointive method, and the most respected of the state jurisdictions are maintained by Governor-appointed judges. Modern viewpoint tends toward some form of board of recommendation, without mandatory power, acting in cooperation with the Governor. While the Act would eliminate judicial campaigns at the polls, or at least the present type of campaign, there are many observers who believe that a judge should on occasion venture out among the people, lest the dignity of office obscure the vision. And campaign evils now prevalent could be corrected by a few rules welcome alike to candidate and voter.

Then, too, I have a pet scheme that would constitute the Supreme Court an Advisory Board, whose recommendations for each office would be printed on the ballot for the guidance of the voter, and submitted to the Governor when appointments are pending. Such method would omit the complicated political factors of the Amendment, would mark the end of campaigns at the polls because they would be an unproductive luxury, and would give immediate results. But I suspect that the plan is not sufficiently radical to excite interest. —(BULLETIN, January, 1933.)

STUDY OF JUDGESHIPS.

For the above reasons I feel that the Amendment would fail in the major objective, and for the further reason that the Act is objectionable in that it is counter to the tide toward a more liberal and informed functioning of the Democracy, of which the evidence is at every hand. If it be said that the Act was the best obtainable from the Legislature, the answer is that the years 1934-5 may see changes in the halls of the law-makers. The American Bar Association is hastening a study of judgeships that will be a valuable contribution to the subject.

Probably as never before in our day the Bar is conscious of the public demand for reforms in more than one department of the law; but the responsibility of forcing an amendment of the over-burdened State Constitution, already cracking under the strain, in the vital matter of judicial selection, is a grave one that should not be lightly undertaken. It might be well to pause and consider before the Bar commits itself and the County past recall to the pending Amendment as a Constitutional cure-all. Perhaps we should have an informed Bar Plebiscite at home to decide the questions presented by the Act in the light of the problems that in some aspects are peculiar to the local Bench and Bar.

Result of Ballot for Bar Officers

THE SPECIAL COMMITTEE appointed by President Lawrence L. Larrabee to canvass the ballots cast for the Election of Officers and Trustees of Los Angeles Bar Association for the respective offices, begs leave to submit the following report:

For President, W. H. Anderson	780
Scattered among eight candidates	14
For Senior Vice-President, Joe Crider, Jr.	784
Scattered among four candidates	4
For Junior Vice-President, E. D. Lyman	781
Scattered among six candidates	6
For Trustees from active members of Association:	
Frank B. Belcher	780
Scattered among three candidates	4
Arnold Praeger	755
Scattered among seven candidates	7
Jack W. Hardy	751
Scattered among five candidates	5
J. Karl Lobdell	776
Scattered among three candidates	3
For Trustees from Affiliated Associations:	
Herbert L. Hahn	735
Pasadena Bar Association	
Scattered among two candidates	2
Ernest E. Noon	714
Beverly Hills Bar Association	
Scattered among three candidates	3

Respectfully submitted,

AUGUST F. MACK, JR., Chairman. JOHN C. MORROW.
MANLEY C. DAVIDSON. CAROL G. WYNN.

The Board of Trustees

MEMBERSHIP COMMITTEE

THE 1933-34 Membership Committee, composed of Margaret K. Holcomb, John E. Biby, D. H. Laubersheimer, Emmett A. Tompkins and Courtney A. Teel, reported that 211 members of the State Bar had been recommended to membership, a large majority of whom are young men recently admitted to practice.

The report says that "these young men evidence a keen interest in the Association and have, in great numbers, stated their intention of identifying themselves with the organization for its good as well as for the benefits to be received by them. It has been the aim of the Committee . . . to stimulate in these younger members an interest in Association affairs, for our Association, . . . like the nation at large, is dependent upon these enthusiastic young people for our continued well being."

JUDICIARY COMMITTEE.

The annual report of the Judiciary Committee, Kemper Campbell, chairman, was presented and certain recommendations therein approved, or referred to the incoming committee for further consideration.

On the subject of proposed decreases of the number of Superior Court judges, the report says:

> "An investigation was made by subcommittee consisting of G. C. DeGarmo and Robert P. Jennings. As this is a matter which of necessity will have to be considered anew by the incoming committee, we will not encumber this report by statistical details. Suffice it to say that the investigation disclosed no fact warranting a decrease in the number of Superior Court judges at this time. The committee recommends that a very careful study be made during the coming year of the volume of business transacted by the Superior Court of this county and of various proposals for the acceleration of judicial machinery to the end that construction measures may be submitted to the next Legislature for adoption. The committee desires to call special attention to the congestion which now obtains in the District Court of Appeal, Second Appellate District."

The Board approved this recommendation and voted that the incoming committee's attention be invited to the congestion which now obtains in the District Court of Appeal, Second Appellate District, with the request to the committee that this matter be given its serious consideration.

The subject of the practice of law by Justices of the Peace and consolidation of offices, was referred to J. W. Morin of Pasadena and Allen P. Nichols of Pomona for consideration. A report signed by Mr. Morin, addressed to the chairman of the Judiciary Committee was submitted, which says, in part:

> "The mere determination as to whether or not Justices of the Peace should sit upon the Municipal bench, or whether or not Justices of the Peace should practice law is only a fragmentary phase of the general subject, and it is idle for us to devote any particular time to it unless the more fundamental subject is considered, that is, the whole matter of condition of the administration of law in Justice's Court in the County.
>
> "A very helpful study of the Justice's Court situation in the County of Los Angeles has been made by the Bureau of Efficiency of the County of Los Angeles, and a fifteen-page report has been filed since January 1st, entitled 'Survey of Judicial Townships.' Instead of your committee being in a position of tendering a final report, I believe that the report that I have referred to from the Bureau of Efficiency should rather be used as a basis for discussion. From this report it will appear that the whole Justice's Court machinery is archaic and fantastic in its varying per capita cost in different parts of the County. It appears that the Township Court which was established at Universal City, for example, transacted no business whatsoever during one entire year, and yet it was made a stepping stone by which the incumbent Justices of the Peace with this sinecure by appointment of the judicial counsel, practiced law a part of the time, and held as-

signments in the Municipal Court of Los Angeles the balance of the time.

"It is believed that over $100,000.00 per year could be saved by reorganizing the set-up of lower courts, but, of course, the study of the question involves all sorts of political ramifications, and it involves amendments to existing State Law and also amendments to various Municipal Charters.

"The subject is now before the Board of Supervisors as a committee of the whole."

Mr. Morin orally concurred in the report.

USE OF JUDICIAL TITLE FOR BUSINESS PURPOSES.

The Judicial Committee report states that a sub-committee consisting of Donald Barker and Oscar Seiler considered the above subject and Mr. Barker reported thereon. The Judiciary Committee says as to the report:

"It is the opinion of the Committee that the advertisement of the judicial office for purposes of private gain is contrary to the canons of judicial ethics of the American Bar Association and that this is true regardless of the success or failure of the enterprise. It is recommended that a questionnaire be sent to all judges in Los Angeles County for the purpose of eliciting other alleged instances of the misuse of the judicial office for advertising purposes. After all possible information is obtained appropriate representations should be made to the offending members of the Bench and if the practice is not promptly discontinued resolutions should be adopted and due publicity given."

COMMITTEE ON DELINQUENT DUES.

A Special Committee on Delinquent Dues, comprised of T. W. Robinson, chairman, E. D. Lyman and Jack W. Hardy, recommended that those delinquent members of the Association admitted to practice by examination in 1931, and in June, 1932, be reinstated upon the payment of $5.00, plus their 1934 dues, based on the schedule adopted by the Board last year. This schedule provides as follows:

No dues for the first year;
Second year $2.50;
Third year $5.00;
Fourth year $7.50;
Fifth year and thereafter $10.00.

Under the plan recommended, those admitted in 1931 will pay $5.00 reinstatement, and $7.50 for 1934 dues. Those admitted in June, 1932, will pay $5.00 reinstatement, and $5.00 for 1934 dues.

These recommendations were approved and delinquent Juniors ordered placed back on the active list upon payment of the fees stipulated in the report.

SPEAKERS BUREAU COMMITTEE.

The annual report of the Committee was presented, signed by Chas. E. McDonald, chairman, and the recommendations made therein referred to the incoming administration for consideration and action. Some interesting details of this report appear elsewhere in THE BULLETIN.

COMMITTEE ON LEGAL EDUCATION.

President Larrabee presented a communication from the Committee on Legal Education which requests the Board of Trustees adopt a resolution which shall endorse the system established for the conducting of bar examinations, and shall express confidence in the integrity and judgment of the members of the Board of Bar Examiners. A resolution was adopted

"That the Board of Trustees of the Los Angeles Bar Association expresses its highest confidence in the integrity and sound judgment and fairness of the members of the Board of Bar Examiners, both individually and collectively, and

"Be it further resolved, that a copy of this resolution be forwarded to each member of the Board of Bar Examiners, to the President of the State Bar of California, and to such other persons or associations as the Board of Trustees may deem proper."

LENIENCY OF SUPREME COURT.

From time to time the Board of Trustees has been requested to take some appropriate action with reference to the apparent extreme leniency on the part of the Supreme Court of California toward members of the bar brought before the Court in disciplinary actions. This matter was discussed at length, and it was voted that the President, Senior Vice-President and Junior Vice-President of the Los Angeles Bar Association shall wait upon the Supreme Court Justices and present to them the question of the alleged extreme leniency in grievance matters.

"Shield of Silence"*

By George Z. Medalie, former U. S. Attorney for Southern District of New York*

EVERY LAWYER is educated at the public expense. The cost of his education is not met by the mere payment of his tuition fees. He acquires skill through opportunities afforded him not only by his clients, but by an elaborate system for the administration of justice which is so costly that every now and then the public complains of its expense as well as its futility. In return, the community which has given the lawyer his position of comparative importance, has a right to demand some substantial return. How does the lawyer usually pay this debt?

Normally he does it in two ways. First, he evinces only the casual interest of the ordinary citizen in matters of general public concern and carries no sense of obligation to maintain an effective interest by personal effort for the improvement of the political and legal structure upon which civilized life is based. Secondly, he appoints himself to the easy post of guardian of things as they have always been and vigorous opponent of all change, content in the attitude that there is nothing new to be learned and nothing in particular to be done. The gist of opinion in the law journals and at bar meetings adds little to stir the great majority from its lethargy.

A pitiful minority continues, at the expense of amused disapproval, to voice some discontent. When they intrude into the disrupted affairs of their prostrated localities, suggest a better personnel in the administration of justice, a new ordering of the courts, they run the risk of being considered impractical faddists. Proposals for fundamental changes in our legal system, either on the civil or criminal side, rarely stir the imagination of more than the smallest group.

MUCH LITIGATION FRIVOLOUS.

Much of our litigation is still frivolous. The law suits that are commenced and dropped, the defenses that are interposed and for which no proof is offered, still represent a large part of the long list of our litigated causes. So far nothing substantial has been done to halt this toying with our courts and their expensive machinery.

The right to sue ought to be a privilege determined by a preliminary showing. The right to defend ought to be similarly tested. If there are constitutional objections, heavy security could be demanded if either the insistence to sue or to defend failed to meet fair tests given in advance.

We still consider money damages the only remedy for most wrongs. The manufacturer who orders raw materials for next season's output may collect money for breach of contract two years hence, but he cannot get his goods. He may be ruined by the closing of his factory, but an old legal doctrine is vindicated. The lawyer tells the befuddled litigant that the court cannot compel the delivery of goods, and "adequate remedy at law," which everybody knows is inadequate, remains impregnable in its uselessness.

ARCHAIC SYSTEM.

The criminal law is gradually ridding itself of most of its procedural technicalities. The system is nevertheless archaic. It still begins at the wrong end. In important cases where only the most thorough going investigation before trial can develop the truth, constitutional guarantees halt inquiry. A sensible way to search for the truth concerning a defendant's conduct is to ask him first. This is done everywhere but in the English-speaking world. The heresy and sedition hunts of centuries ago put an end to that. The original reasons for the immunity against self-incrimination have been forgotten. Now the pickpocket, the stock racketeer and the gangster halt the processes of justice by invoking this old doctrine. If we sat down to draw a new code of human rights with a fair regard for the community's protection, we would never countenance such frustration.

A reordering of the administration of justice is always hampered by an unwillingness to chop away the overgrowths of the past. To approach the subject properly requires an attitude of willingness to look at present realities rather than at history. For this a re-education of the bar is necessary.

*Furnished by American Bar Association. An address delivered before Columbia Law School Alumni Association at the Lawyers' Club, New York.

Oil and Gas Royalties as Interests in Land

THE CALIFORNIA DOCTRINE

*By Leon B. Brown, of the Los Angeles Bar

A FEW MONTHS ago the Junior Barristers initiated a prize competition for legal articles. Participation was limited to the members of the Junior Barristers, and cash prizes were provided, to be awarded to the first four, in the order of merit, as determined by the judges. The competition was open to all Juniors. It was stipulated that participants confine their articles to subjects of current interest to lawyers, and that awards would be based on general excellence, authoritativeness, originality of thought, and the value of the article to the particular field to which it relates.

The judges were Frank G. Finlayson, Oscar Lawler and Robert Kingsley. The prizes were awarded at the January meeting of members of the Los Angeles Bar Association, as follows:

First prize, $50.00—Leon B. Brown.
Second prize $30.00—Arthur E. White.
Third prize, $15.00—Lewis Drucker.
Fourth prize $ 5.00—Frank L. Humphrey.

THE BULLETIN will print the winning articles, as well as others receiving special mention by the judges, from month to month, as space permits. In this number the article awarded first prize is printed.

ONE OF THE most perplexing problems in the law of oil and gas is the extent to which investors in royalties, by recording their "royalty assignments," may protect their rights against *bona fide* purchasers of the lease or subsequent lessees taking without actual notice. The solution of this problem, in the case of any particular royalty interest, rests upon a determination of whether or not it is an interest in land.

The phrase "interest in land" is used advisedly, to avoid the confusion which sometimes arises from the employment of such phrases as "real property" or "real estate" when referring to chattels real. Whether an interest in land is real or personal property must depend, of course, upon its term or duration. Thus, an easement for years is personalty, and an easement in fee is real property; but in each case such easement is an interest in land, binding upon all who take with constructive notice thereof. For the purpose of this discussion the important question is, not whether such an hereditament is real or personal property, but whether it is an interest affecting the title to land within the meaning of our recording statutes.

ROYALTY DEFINED.

Much of the confusion as to the nature of oil and gas royalties arises from the various meanings given to the term "royalty." In a recent case,[1] the Ohio Supreme Court defined royalty as "a certain percentage of the oil after it is found or produced," and therefore concluded that such royalty was not an interest in land. It is obvious that if we use the term in this sense, as referring to a portion of the oil or gas itself after separation from the soil, it must always be a mere chattel personal. Under this definition it is impossible to explain the many decisions holding certain types of royalties to be interests in land. These decisions use the term "royalty" in a second sense, one which is more in accord with careful usage, as referring to the *right* to a share of future production from certain premises, or the proceeds of sale thereof. Although the oil and gas when produced, or the money for which they are sold, may be chattels of the commonest sort, the right to receive them may be an incorporeal interest in the land itself. In discussing incorporeal hereditaments, Blackstone says (Vol. 2, p. 20):

*Winner of first prize in the Junior Barristers' "Competitive Legal Articles" Contest.
1. *Pure Oil Co. v. Kendall*, 116 Ohio St. 188, 156 N. E. 119.

"Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament; for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand."

It is in this second sense that the term "royalty" will be used in this discussion.

THREE TYPES OF ROYALTIES.

In determining whether or not royalties are interests in land a further distinction is necessary. There are three principal types of oil and gas royalties. The first classification consists of rights arising under instruments issued by lessees whereby, in consideration of money, equipment or services advanced to them, such lessees purport to transfer fractional interests in future production or its proceeds. The nature of the right acquired under such instruments was finally determined by the California Supreme Court in the recent case of *Western Oil & Refining Co. v. Venago Oil Corp.*, 86 C. D. 260, decided August 30, 1933 (re-hearing denied September 28, 1933). In that case the so-called assignments were held to constitute present sales of oil and gas potentially in the possession of the lessee and, as such, binding upon an assignee of the lease. The royalty holder was regarded as holding an inchoate title to a portion of the oil and gas as personalty which ripened into a legal title upon severance of the substance from the soil. The Court, however, quoted with approval from an earlier decision of the District Court of Appeal, *Black v. Solano Co.*, 114 Cal. App. 170, 299 Pac. 843, in which it was held that such royalties were not interests in land within the meaning of the recording statutes.

There was some question in *Western Oil & Refining Co. v. Venago Oil Corp.*, as to whether the royalty assignments purported to convey an interest in the oil and gas itself, or merely in the proceeds of sale of such production. It was urged, on the authority of *In Re Lathrap*, 61 Fed. (2d) 37, a federal case arising in California, that where the assignments dealt only with the monetary proceeds of future production they gave rise simply to choses in action for the recovery of such proceeds, and in no sense passed title to the oil and gas itself. The California Supreme Court refused to pass on the validity of this distinction, and the *Lathrap* case should still be kept in mind when considering royalties of this class.[2]

LANDOWNERS' ROYALTIES.

A second type of royalty which has come before the courts of this State is that reserved by the landowner under the usual oil and gas lease. The courts have held such landowners' royalties to be vested interests in land, but have neglected to furnish a sufficient statement of the reasons supporting that conclusion. A study of these decisions leaves much to be explained.

In *Jones v. Pier*, 124 Cal. App. 444, 12 Pac. (2d) 646 (hearing denied by Supreme Court August 19, 1932), a community lease had been executed by the Garrisons and Piers, owners of two separate parcels of land, on a 25% royalty, which lease provided for forfeiture upon failure of performance by the lessee after written notice given "by the lessors." In 1923 the Piers executed and delivered to the plaintiff an instrument reading, in part, as follows:

"We, W. F. Pier and Agnes Pier, his wife, owners by virtue of a community lease dated October 10, 1922, of . . . 12½% of the total production of oil, gas and other hydrocarbon substances extracted . . . do hereby sell, assign, transfer and set over unto C. A. Jones, of Long Beach, California, one per cent (1%) of said total production. . . ."

In 1924 the Garrisons successfully prosecuted a suit against the lessee for cancellation of the lease in so far as it covered Lots 91 to 96, a portion of the land which they alone owned. It was held that

2. The decision in *Western Oil & Refining Co. v. Venago Oil Corp.*, is of only temporary value, as the doctrine of potential possession was abolished by section 5 of the Uniform Sales Act, enacted by our Legislature in 1931, as section 1725 of the Civil Code. The decision, however, still determines the nature of royalties issued prior to August 14, 1931, the effective date of the Act. Civil Code, section 1797.

neither the Piers nor the plaintiff were bound by the judgment, inasmuch as the right of forfeiture was vested in the lessors jointly and not severally. Over the plaintiff's objection the trial court, in the case of *Jones v. Pier,* had admitted in evidence an agreement dated 1925 wherein the Piers and Garrisons agreed that the lease might be cancelled as to Lots 91 to 96. The appellate court held that the original lessors could not thus, without the plaintiff's knowledge or consent, terminate the vested interest conveyed to him, that the plaintiff had acquired an undivided 1% interest in future production from the land within the twenty-year term of the lease, regardless of who produced the same, and that subsequent leases within such term were subject to said "prior vested right." No authority is cited and no reason is given for thus characterizing plaintiff's royalty.

The case of *Beam v. Dugan,* 73 C. A. D. 1165, 23 Pac. (2d) 58, presented facts very similar to those in *Jones v. Pier.* The instrument by which the landowner's royalty was conveyed to plaintiffs recited the execution of the lease and the reservation thereunder of one-fifth of all future production, but did not expressly limit the royalty conveyed to the term of the lease. Subsequently, the landowners acquired quitclaim deeds from the lessees under the original lease and executed a new lease covering a portion of the same premises. The decision of the trial court that plaintiffs acquired no rights against the subsequent lessee was reversed, on the authority of *Jones v. Pier.* The court, however, used the following significant language:

> "The landowner's royalty was in the nature of a rental paid by the lessees for the privilege of drilling for and extracting oil from the land. Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 684, 74 P. 296. Thus in selling a portion of their landowner's royalty in and and all oil produced or saved from any wells to be drilled upon 'any of the land described', the vendors were selling an interest in their right as owners of the land to take and receive rental by way of a royalty upon all oil which might be produced."

After briefly reviewing the opinions held in other jurisdictions as to the absolute ownership of oil and gas in place the court concluded:

> "With these conflicting views of the character of the deposits in place there is, however, an unanimity of opinion that a reservation or sale by the landowner of an interest in the royalty or the rentals to be obtained from the land creates in the purchaser a right incident to the land itself which cannot be defeated by the act of the landowner without the consent of the purchaser."

In *Callahan v. Martin,* 74 C. A. D. 613, 24 Pac. (2d) 866, the landowner conveyed to plaintiffs a 3% royalty in fee. Although the instrument did not refer to the lease previously executed there was, in fact, such a lease, as appears from the briefs on file in the case. The court summarily disposed of the appeal on the authority of *Beam v. Dugan, supra,* saying it was there held that a similar instrument conveyed "a vested interest in the real property." A hearing was granted in this case by the Supreme Court on October 23, 1933.

EFFECT OF ASSIGNMENTS.

The case of *Beam v. Dugan* might have pointed the way to the general recognition of the theory hereinafter discussed had it not been for the very recent case of *Dabney-Johnston Oil Co. v. Hitchcock,* 76 C. A. D. 181, decided October 4, 1933, by the same court, and in which a rehearing was granted on November 3, 1933. In the *Dabney-Johnston* case the assignments of land-owners' royalties were held to be conveyances of interests in land in perpetuity and binding upon the appellant, a subsequent purchaser of the fee. The assignments had been duly recorded before appellant acquired title. The decision is perfectly consistent with the earlier cases; but there are several expressions which, it might be contended, indicate that the assignments constituted conveyances of oil and gas in place.

A careful reading of the opinion, however, will show that the court relied solely upon the authority of *Beam v. Dugan, supra,* and refrained from committing itself as to the doctrine of that case. In *Richfield Oil Co. v. Hercules Gasoline Co.,* 112 Cal. App. 431, 297 Pac. 73 (hearing denied by Supreme Court on May 4, 1931), the same court had held that "there can be no grant or conveyance of oil or

gas in place separate and apart from the right to go upon the premises and extract them."[3] With this language in mind, the appellant called attention to the fact that the assignments contained no right of entry upon the land, and therefore argued that respondents had acquired no interest in the land. To this the court replied: "But, in this state, as we have shown above, it has been held that under some assignments the assignees acquired an interest in the land. (*Beam v. Dugan, supra.*)" What the court had in mind as to the theory underlying its decision in *Beam v. Dugan* is open to conjecture; but, in view of the language it had used in the *Richfield* case, it is extremely unlikely that it intended to define landowners' royalties as interests in oil and gas in place. Such a doctrine would be wholly inconsistent with the view heretofore entertained by our California courts as to proprietary rights in oil-bearing land.

CHARACTER OF CONSIDERATION.

If, then, the difference between royalties of the two types thus far discussed cannot be based upon the theory that landowners' royalties are conveyances of oil and gas in place, upon what theory does the distinction rest? The one important difference between royalties of the first and second types is in the consideration for which they are created. Royalties of the kind considered in *Western Oil & Refining Co. v. Venago Oil Corp.* are issued in return for money, labor or materials; landowners' royalties are a consideration for the use of land. The significance of the language used in *Beam v. Dugan*, in referring to landowners' royalties as rentals for the privilege of drilling for and extracting oil from the land, lies in the fact that a rent—or, more accurately, the right to unaccrued rent, as distinguished from rent already due—has at all times been regarded as an incorporeal hereditament and included within the definition of land.[4] Such hereditaments are classed as servitudes under section 802, subdivision 4 of our Civil Code, and in section 1111 of the same Code it is recognized that they may be separately reserved or conveyed. Landowners' royalties are, therefore, in no sense anomalous interests in land. They have been declared to be rents by the highest authority. In *United States v. Noble*, 273 U. S. 74, 59 L. Ed. 844-848, Mr. Justice Hughes, in considering an assignment of landowners' royalties reserved under an oil and gas lease, said:

> "The rents and royalties were profits issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives. . . .
>
> "It is said that the leases contemplated the payment of sums of money, equal to the agreed percentage of the market value of the minerals, and thus that the assignment was of these moneys; but the fact that rent is to be paid in money does not make it any the less a profit issuing out of the land."

COMMON LAW DOCTRINE.

Some authorities have questioned the applicability of the common law doctrine of rents on the ground that oil and gas leases contemplate exhaustion and depletion of the mineral estate, and not a mere use thereof.[5] This argument is answered in *McIntyre v. Bond*, 227 Ky. 607, 13 S. W. (2d) 772, 64 A. L. R. 630, where the court pointed out that the royalty reserved under an oil and gas lease is compensation not only for the substances extracted, but also for the holding of the rest of the land.[6]

The court concluded:

> "The royalty is compensation for the privilege or rights created by the lease, and, since such privileges or rights are by settled law in this state an interest in real estate, then the royalty, being a payment for such interest in real es-

3. It has sometimes been assumed from this expression that there may be a conveyance of oil and gas in place when accompanied by a right of entry. The error in this assumption appears from the several decisions in this State holding, without qualification, that there can be no absolute ownership of oil and gas in place, but only of the exclusive right to extract the same by drilling from a given surface. *Western Oil & Refining Co. v. Venago Oil Corp.*, 86 C. D. 260, 265; *People v. Assoc. Oil Co.*, 211 Cal. 93, 294 Pac. 717; *Acme Oil & Min. Co. v. Williams*, 140 Cal. 681, 74 Pac. 296; *Bandini Petroleum Co. v. Superior Court*, 110 Cal. App. 123, 293 Pac. 899 (hearing denied by Supreme Court January 26, 1931), affirmed 284 U. S. 8, 76 L. Ed. 136. The dictum in *Kidwell v. General Petroleum Corp.*, 212 Cal. 720, 729, 300 Pac. 1, recognizing that leases may limit exploration to given strata, is not necessarily inconsistent.

4. 36 *Corpus Juris* 288-9; Ann Cases 1918-A, page 148, n.

5. Walter L. Summers, Transfers of Oil and Gas Rents and Royalties, in 10 Texas Law Review, 1, 2.

6. See, also, *Reg. v. Westbrook*, 10 Q. B. 178, 116 Eng. Reprint 69, 22 Eng. Rul. Cas. 623.

tate, is an incorporeal hereditament issuing out of the land and hence rent."[7]

It may be objected, further, that the common law hereditament known as a rent could issue only out of tenements corporeal, and that landowners' royalties can, therefore, be regarded as rents only in the exceptional cases where the right of the lessee is of that nature.[8]

It must be conceded that the term "rent" has frequently been defined as a return or compensation for the possession of some corporeal inheritance, and it has been held in some early cases that the return for the use of an incorporeal hereditament is not rent; but this view has been criticised[9] and the more recent authorities seem to have rejected it entirely.[10]

Regarded as rents, it becomes at once apparent that landowners' royalties are interests in land which may be reserved or conveyed separate and apart from the reversion. Estates may be created therein in fee or for years. If a particular royalty is limited in term to the duration of a lease it falls within the same classification as the right under the lease itself. Thus, if the lessee is possessed of a chattel interest in that incorporeal hereditament known as a *profit a' prendre*, the purchaser of the landowners' royalty acquires a correlative chattel interest in the incorporeal hereditament known as a rent.[11]

Once a certain share of production or its proceeds becomes due under the terms of the lease, the right of the royalty holder to recover it becomes a mere chose in action. And, of course, the oil and gas itself and the money for which it is sold are both chattels personal. But these facts have no bearing on the nature of the royalty, as that term is correctly defined.

SUBLESSOR'S ROYALTY.

A third type of royalty, not so common as those hereinabove discussed, but presenting problems of even greater complexity, is what may be called a sublessor's royalty, and arises when a lessee subleases or "assigns" an oil and gas lease, reserving to himself a right to a share in production over and above the landowners' royalty reserved in the original lease. The question here presented is whether such a royalty partakes of the nature of a rent or is more nearly analogous to royalties of the first type considered. In *Emerson v. Little Six Oil Co.*, 3 Fed. (2d) 265 (certiorari denied 268 U. S. 700, 69 L. Ed. 1165), the lessee assigned the lease to Emerson and Noble. Emerson then transferred his interest to Noble, reserving, however, an additional royalty of 1%, which he subsequently conveyed to his wife, the plaintiff. The court said:

> "Upon the production of oil in paying quantities, an estate in the land was created, such to be divested upon conditions subsequent; that is, the failure to comply with the terms of the original lease. . . . The reservation of the royalty was therefore an interest in the land, and not a mere personal right enforceable only against Noble."

In a later case arising out of the same facts, *Little Six Oil Co. v. Noble*, 17 Fed.

See also:

7. *McRae v. Japhet* (Tex.) 269 S. W. 829, and *State v. Royal Mineral Ass'n*, 132 Minn. 232, 156 N. W. 128, Ann. Cas. 1918-A 145.

The courts of this State have in several instances treated landowners' royalties as rents. *Adams v. Petroleum Midway Co.*, 205 Cal. 221, 270 Pac. 668; *Clark v. Richfield Oil Co.*, 127 Cal. App. 495, 16 Pac. (2d) 162 (hearing denied by Supreme Court January 12, 1933); *Beam v. Dugan, supra.*

8. In some jurisdictions a distinction has been drawn between leases wherein the granting clause purports to let or demise the surface, and those in which the granting clause merely conveys the exclusive right to drill for and extract hydrocarbon substances, leases of the first type being regarded as conveying a corporeal right, and leases of the second an incorporeal right. This distinction finds support in some of our early cases. *Kline v. Guaranty Oil Co.*, 167 Cal. 476, 140 Pac. 1; *Chandler v. Hart*, 161 Cal. 405, 119 Pac. 560; *Smith v. United Crude Oil Co.*, 179 Cal. 570, 178 Pac. 141.

9. *Cooley's Blackstone*, Vol. 1, page 446, n.; *Thompson on Real Property*, Vol. 1, page 319.

10. *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, 64 N. E. 680; *Mandebach v. Bethany Orphans' Home*, 109 Penna. 231, 2 Atl. 422; *Daniel v. Gracie*, 6 Q. B. 145, 115 Eng. Reprint 56, 13 L. V. Q. B. N. S., 309; *Rex v. Mirfield*, 10 East 219, 103 Eng. Reprint 758.

None of the four recent decisions in this State holding landowner's royalties to be interests in land consider the distinction here discussed. It should be noted, however, that section 802, subdivision 4 of the Civil Code, does not limit the source of rents. And in *Higgins v. Calif. Petroleum & Asphalt Co.*, 109 Cal. 304, 41 Pac. 1087, the court observed that no surface right was conveyed under the lease there in question, but added "yet such a lease of a mine reserving a royalty as rent is unobjectionable."

11. The usual provision in oil and gas leases fixes the term at a given number of years "and so long thereafter as oil or gas may be produced in paying quantities." This extension clause has been regarded by some courts as making the lessee's estate a determinable fee and, therefore, a freehold estate. *Mills-Willingham, Law of Oil and Gas*, pages 59-60. But California has adhered to the rule adopted in West Virginia, that the extension clause merely gives the lessee the option of continuing production after the expiration of the fixed term as a tenant from year to year. *Richardson v. Callahan*, 213 Cal. 683, 3 Pac. (2d) 927. See also, *Graciosa Oil Co. v. Santa Barbara*, 155 Cal. 140, 99 Pac. 483; 20 L. R. A. (N. S.) 211, where the court referred to *Harvey C. & C. Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 927, and cases there cited. Among the cases quoted in *Harvey C. & C. Co. v. Dillon* is *State v. South Penn Oil Co.*, 42 W. Va. 102, 24 S. E. 688, which clearly expresses the doctrine followed in that State.

(2d) 728, the Circuit Court of Appeals said:

> "Plaintiff had both constructive and actual notice of the existence of Emerson's reservation of royalty in his conveyance to Noble, and undertook to protect itself, so far as was possible, in its lease under which oil is now being produced. Under the partition agreement, plaintiff and Noble each took an assignment of his interest, burdened with the Emerson royalty to the full extent that it was burdened with the royalty reserved by the original owner and lessor of the entire tract of land."

This language is worthy of attention. If a royalty of this third type is of the same dignity as a landowners' royalty, it may be that the reason is the same in each case and that a royalty of this type is also a rent. Now, the right to additional compensation for the use of land is most commonly reserved in what are known as subleases; and in every sublease this additional right, though separated from the reversion, is a rent and an interest in land.[12] It is for this reason that the decisions of the courts of Montana and Louisiana relating to this type of royalty are of particular significance. In *Sunburst Oil & Refining Co. v. Callender*, 84 Mont. 178, 274 Pac. 834, it was held that the reservation of an additional royalty to the "assignor" in a so-called assignment of an oil and gas lease converted the instrument into a sublease. In *Smith v. Sun Oil Co.*, 165 La. 907, 116 So. 379, the court reached the same conclusion, assigning as a reason that royalty was reserved "under penalty of reversion," a phrase explained in *Roberson v. Pioneer Gas Co.*, 173 La. 313, 137 So. 46, as referring to the right of re-entry for breach of condition.[13]

JULIAN CASE.

In the case of *Julian Petroleum Corp. v. Courtney Petroleum Corp.*, 22 Fed. (2d) 360, the Ninth Circuit Court of Appeals, in a case arising in this State, had under consideration a reservation of royalty contained in a so-called assignment of an oil and gas lease. The transcript on appeal discloses that the original lessee reserved a given percentage of the proceeds of future production from the premises. In answer to the argument that the assignment created a partnership, or joint adventure, the court quoted from the case of *Z. C. Miles Co. v. Gordon*, 8 Wash, 442, 36 Pac. 265, in part, as follows:

> "It seems to us that this agreement cannot be construed to be a formation of a partnership in any sense. It purports to be a lease. It is recited in the instrument itself that it is a lease, and while, of course, such recitation would not make it a lease if the elements of partnership were in the agreement, yet it seems to us that these elements are entirely wanting. Leases which provide for a division of the profits are of common occurrence in the business world. . . . We know of no reason why a person who has a house or a farm, or any other character of property which he is desirous of leasing, shall not be allowed to make his own terms as to what the payment shall consist of; whether, in the case of a farm, it shall be for one-half of the gross amount of grain raised, or for one-half of the amount of grain raised after the expenses of putting in and harvesting the crop are deducted, or for a certain number of bushels of grain without regard to the amount raised, or for a certain specified sum of money. In each instance the amount agreed upon is intended as a payment for the use of the premises, and in the case at bar it seems that nothing more is imported into this contract than is generally found in contracts of lease."

By thus adopting the language of the Washington court as its own, the court implied that it considered the "assignment" in question as being, in fact, a sublease.

The question at once presents itself as to whether a sublease may arise upon a conveyance for the entire unexpired term. There is a square conflict of authority upon this point, but the question is settled in California in the affirmative,[14] where the courts follow the rule announced in the leading case of *Dunlap v. Bullard*, 131 Mass. 161, as follows:

12. *Beal v. Boston Spring Car Co.*, 125 Mass. 157, 28 Am. Rep. 216.
13. See, also, *Willard v. Campbell* (Mont.), 11 Pac. (2d) 782, and *Johnson v. Moody*, 168 La. 799, 123 So. 330.
14. *Barkhaus v. Producers' Fruit Co.*, 192 Cal. 200, 219 Pac. 435; *Kendis v. Cohn*, 90 Cal. App. 41, 58 59, 265 Pac. 844; *Backus v. Duffy*, 103 Cal. App. 775, 284 Pac. 954.

"If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term."

In the case of *Backus v. Duffy*, 103 Cal. App. 775, 284 Pac. 954, the court found the right of re-entry for breach of condition was impliedly reserved by reference to the original lease. The conveyance, denominated and held to be truly a sublease, contained the provision that "the lessee shall be governed by all the covenants and agreements contained in that certain lease (describing the original lease). . . ." The court said:

"Furthermore, under the terms of her contract, the defendant adopted the reversionary clause contained in the original lease. That instrument retained the right to re-enter before the expiration of the term on the breach of condition. The right of reversion was continued, but on conditions quite different as to the amount of rent and carrying plaintiff's 'lines'."

Most so-called assignments of oil and gas leases, by thus referring to the original lease, impliedly reserve a right of re-entry in the assignor, and under the rule of *Backus v. Duffy* should be regarded as subleases. A case involving such an "assignment" was presented in the very recent case of *Smith v. Drake*, 75 C. A. D. 349, decided October 28, 1933. The court, however did not pass upon the principal question as to whether the instrument of conversion was a true assignment or a sublease, but based its decision that the excess royalty reserved by the original lessee was not an interest in land upon the ground that no sufficient production had taken place under the lease. The doctrine relied upon is one expressed in the early case of *Brookshire Oil Co. v. Casmalia Ranch & Development Co.*, 156 Cal. 211, 103, Pac. 927, that under oil and gas leases the lessee acquires no vested estate until oil and gas are found. The court also declared that the royalty under consideration was what is known as an "overriding" royalty, and that such overriding royalties in several instances had been held not to be interests in land. The phrase in question has been variously defined. In *Differding v. Ballagh*, 121 Cal. App. 1, 8 Pac. (2d) 201 and *Black v. Solano Co., supra*, it was assumed that it signified the right to a given percentage of gross production payable to any person other than the lessor. But in *Beam v. Dugan, supra*, it was said that the term defined royalties limited in duration to a particular lease. Under the latter definition the royalty considered in *Jones v. Pier, supra*, would have been an overriding royalty, and yet it was held to be an interest in land.

Until the California Supreme Court, in a case not complicated by collateral issues, finally passes upon the nature of royalties of this third type, the question cannot be said to be finally determined in this State. It would seem that on principle they should be regarded as rents, as least where the instruments in which they are reserved expressly or impliedly give the original lessee a right of re-entry for breach of the new conditions imposed.

There is a conflict of authority in other jurisdictions as to whether assignments of rent are within the protection of recording statutes.[15] Some cases fail to recognize the true nature of rents as incorporeal interests in the land; but where that fact is duly acknowledged the courts are agreed that conveyances of such rights fall within the terms of the recording acts.[16] And there should be little doubt in this State that the recording of instruments dealing with such royalties as are truly rents, imparts constructive notice to subsequent purchasers, and to subsequent lessees as well.[17]

15. 75 A. L. R. 270. This conflict is noted in *Pacific Fruit Exchange v. Schropfer*, 99 Cal. App. 692, 279 Pac. 170.

16. *Schmid v. Baum's Home of Flowers*, 162 Tenn. 439, 37 S. W. (2d) 105; *Winnisimmet Trust v. Libby*, 232 Mass. 491, 122 N. E. 575; *John McMenamy Inv. & Real Estate Co. v. Dawley*, 183 Mo. App. 1, 165 S. W. 829.

17. *Bessho v. General Petroleum Corp.*, 186 Cal. 133, 199 Pac. 22; *Waskey v. Chambers*, 224 U. S. 564, 56 L. Ed. 885.

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